BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0055011504 AND 507:

GERI GLASS, individually and on behalf of her infant child, GAGE LOREN GLASS, Charging Parties, vs. MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES, Respondent.	)	Case Nos. 1115-2006 and 1402-2006 **LIABILITY FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

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Charging party Geri Glass (Geri), on her own behalf and on behalf of her minor son, charging party Gage Glass (Gage), filed a disability discrimination complaint with the Department of Labor and Industry on April 13, 2005. The complaint charged that the Montana Department of Public Health and Human Services (DPHHS) violated the Human Rights Act and Governmental Code of Fair Practices by discriminating against both charging parties because Geri had a disability (quadriplegia) and a perceived disability (traumatic brain injury). Employees of DPHHS allegedly engaged in the discriminatory acts during investigation by DPHHS' Child and Family Services Division (CFSD) into reported abuse or neglect of Gage. Geri subsequently filed an amended complaint adding a charge alleging that DPHHS retaliated against her because she complained during CFSD's investigation that DPHHS was discriminating against her because of her disability.

The department divided the complaint into two complaints for investigation. The complaints of Geri individually and Geri on behalf of Gage against DPHHS were referred to the Hearings Bureau for contested case hearing. The Hearing Officer consolidated the complaints for prehearing proceedings and hearing. The parties stipulated to extend department administrative proceedings beyond 12 months after complaint filing, agreeing upon a mutually acceptable hearing and prehearing schedule. The Hearing Officer granted a request to bifurcate the consolidated cases, first hearing liability issues only.

Prior to the liability hearing, the Hearing Officer issued a protective order regarding matters designated as "confidential." Upon a petition by Geri, the Sixth Judicial District Court also issued a protective order regarding confidential information concerning the identity of persons who made reports of possible child abuse or neglect to DPHHS. The district court appointed the Hearing Officer as a special master to conduct an *in camera* review of certain documents and recordings. As special master, the Hearing Officer made recommendations, adopted by the district court, regarding the protection of confidential matters arising in this contested case. A copy of the district court protective order, issued April 3, 2006, is part of the contested case record.

The Hearing Officer held the liability hearing on April 3-5 and 20-21, 2006. A certified court reporter preserved the record. Geri attended with her counsel, Kevin S. Brown, Paoli & Brown, P.C., and Timothy C. Kelly, Kelly Law Office.[1] DPHHS' designated representative, Barbara Maddren-Broughton attended with the agency's counsel, Kimberly K. Kradolfer, Special Assistant Attorney General, DPHHS, and Joe Seifert, Keller, Reynolds, Drake, Johnson & Gillespie, P.C. The transcript of proceedings was prepared and filed with the Hearings Bureau. The transcript reflects the witnesses and their testimony and the exhibits offered and admitted or refused. At the scheduling conference set by this order, the parties should be ready to discuss confidentiality, modification of protective orders and any requests for certification of this decision as final for purposes of appeal.

II. ISSUES

The primary issue is whether DPHHS discriminated in its provision of government services because of Geri's disability, or retaliated because Geri complained of disability discrimination, against Geri and (by association) her minor son, Gage. A full statement of the issues appears in the final prehearing order.

III. FINDINGS OF FACT

1. Geri is a 29-year-old woman who resides in Livingston, Montana. She sustained a C-6/7 spinal injury in a 1996 automobile accident which ultimately rendered her "tetraplegic," which she understands to mean that she has some limited use of her hands and arms, as opposed to "quadriplegic," which she apparently understands to mean total paralysis from the neck down. Initially paralyzed from the

[1] Geri, without objection, attended most but not all of the hearing. Gage, who is still a very young child, attended briefly.

neck down, Geri developed some ability to use her hands and arms and to move her neck during her recovery and rehabilitation. She remains totally paralyzed from the waist down, including the back muscles that raise and lower the upper torso. She cannot get in and out of bed without assistance. She retains some upper body strength and capacity for voluntary movement in her arms, hands and neck, with some manual dexterity (albeit with limited hand and finger strength as well as dexterity). She has limited flexion and extension ability in her arms and some gripping ability. Because of her total lower body paralysis, she cannot use her back muscles as a completely mobile person can to assist in lifting weights with her arms. She has limited weight lifting and bearing capacity with her arms and hands.

2. Geri's physical impairments as a result of the automobile accident substantially limit many of her major life activities. She has a physical disability.

3. Geri receives personal care attendant (PCA) services, which she "self directs." This means that she hires and fires the persons who provide her with PCA services. She receives 39 hours of weekly PCA services for personal care and 11 hours of weekly PCA services for transportation and assistance in socialization activities. She receives funding to pay for these services. She relies upon friends and family members for additional personal assistance, which is both necessary and available, in her day to day life.

4. After she completed her initial recovery from the injuries sustained in the automobile accident, Geri wanted to resume as normal a life as possible. She felt that many of the doctors and other health care and social service professionals with whom she dealt tried to discourage her from achieving this goal.

5. Because she perceived many of the professionals with whom she had to deal as unsupportive of her efforts to expand her life and her activities, Geri became what many such professionals would consider a "difficult" client and patient. She wanted to know why the various professionals counseled caution and limited her activities. She challenged the advice and directions she received. She got second opinions. She sought out and utilized professionals who listened to her, answered her and generally showed her that they gave consideration and weight to her questions and her needs. Whatever her behavior and attitudes had been before her injuries, afterwards she was fiercely independent to the greatest degree possible.

6. Geri wanted to be a mother. She sought (and eventually found, in her Billings physician, Dr. Jackson) a doctor with experience providing medical care and advice regarding childbearing to women with similar conditions. From that

physician, she learned of the risks involved and the options available to her, and she received encouragement. She made an informed decision to bear a child, if and when her personal circumstances allowed it.

7. In 2004, Geri got pregnant. Jeff Wood was the father of the child.[2] Around the time of the birth of their child, Wood was one of Geri's PCAs.

8. Geri's prenatal care during the latter stages of her pregnancy was provided in Billings, Montana, and her son Gage was born in mid-December in St. Vincent's Hospital in Billings. His birth was premature, requiring special initial care.

9. While in St. Vincent's Hospital, Geri visited with the hospital staff, telling them that she planned to return to Livingston with Gage. Geri indicated that she would first stay briefly with Janice Wood, Gage's paternal grandmother, after which she would move back to her own residence to care for Gage with the assistance of her PCAs, family and friends. Geri's conversations with the hospital staff led them to believe that she intended to have her evening caregiver put Gage into bed with her so she could breast feed Gage at night and then have her morning caregiver remove Gage from the bed and change him and provide other needed care. Some of the hospital staff had serious misgivings about Geri's capacity safely to care for Gage by herself.

10. On December 23, 2004, a telephone report (Report 185261) was made to CFSD that there was a substantial risk of physical neglect of Gage because although Geri was unable, due to being quadriplegic, to provide adequate care for Gage by herself (with her current level of assistance), she planned to move home to Livingston and try to do so. The reporting person also mentioned that Gage's father was another concern, because he was an emotionally unstable father.[3] At the time of this report, CFSD had no knowledge of Geri's condition aside from the report itself.

11. CFSD considered the report reliable and credible, in light of the reporting person's identity and occupation (which remain confidential). CFSD correctly understood that the report was entirely based upon the reporting person's understanding of Geri's physical condition and perception of Geri's intentions

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[2] Jeff Wood is not a party to this proceeding, and the evidence includes various prior inconsistent statements regarding whether he is, in fact, the father. The evidence establishes that Geri believes he is Gage's father and that DPHHS treated him as the father. The Hearing Officer considers him the father, for purposes of this case only.

[3] The entirety of Finding No. 10 is a summary of what the reporter communicated to CFSD, not a finding of the truth or falsity of the substance of that communication.

regarding the care of Gage after Geri left the hospital. Gage was still at St. Vincent's at the time of the report, soon to be discharged in Geri's care.

12. DPHHS is a government agency of the state of Montana. Protection of children from parental neglect is one of its regulatory functions, which is performed by CFSD. CFSD's initial regulatory function after receiving a report of alleged child neglect is to investigate. Child neglect includes substantial risk of physical or psychological harm to a child by acts or omissions of a person responsible for the child's welfare. In this case, CFSD correctly understood the reporter's assertion to be that because Geri mistakenly believed she could provide adequate care for Gage with the assistance currently available to her, Gage would be at substantial risk of physical neglect when his mother took him home to her residence in Livingston.

13. CFSD's regulatory function required that it investigate this initial report. CFSD properly classified the report as one that required investigation because the reporter alleged that the caregiver, Geri, would be unwilling or unable to meet the child's immediate needs for sufficient supervision, food, clothing, and/or shelter to protect the child from immediate danger of serious harm, once she returned to her residence in Livingston.

14. In discharging its duty to investigate this report, CFSD had to consider the effects of Geri's physical conditions on her ability safely to parent Gage by herself. It is an important part of CFSD's function to determine whether a parent is adequately caring for a child, even when any failure to do so may stem in part or in whole from a physical disability. CFSD's investigations focus first and foremost on the safety of the child in the current circumstances. It ordinarily does not initially undertake a study of how persons with similar disabilities have used equipment or services to overcome identified risks if, in fact, such equipment or such services are not in place at the time of the investigation.

15. If CFSD has reasonable cause to suspect that a child is currently at substantial risk of suffering harm, it can immediately place the child in emergency protective services and file a petition for temporary custody within two working days. CFSD can also undertake an expeditious investigation and act upon the conclusions it reaches. If it concludes, after investigation, that there is substantial risk of harm to the child, it can petition for custody, with or without immediate placement in emergency protective services.

16. At the conclusion of an investigation into an allegation of child neglect, CFSD decides whether the initial report was "unfounded," "substantiated" or

"unsubstantiated." Those terms are defined by statute and administrative rule. If the investigator decides that there was no substantial risk of neglect, the report would be "unfounded." If the investigator worker decides that there was a substantial risk of neglect, the report would be "substantiated." If the investigator is unable to decide whether or not there was a substantial risk of neglect, the report would be "unsubstantiated." CFSD bases its classification of initial reports upon the preponderance of the investigative evidence.

17. CFSD can only provide long term services to a child when there has been both a determination that abuse or neglect did occur and a termination of parental rights. CFSD, with permanent legal custody of a child, provides for care and physical custody of the child. CFSD's long term services do not include providing parenting services by others on behalf of a parent with custodial rights to a child.

18. CFSD cannot access or control access to services provided by other divisions of DPHHS. Each program has its own eligibility requirements and sources of funding. For example, a child in CFSD custody with developmental disabilities or mental illness who has been receiving services for such disabilities will "age out" or "time out" of the foster care system at age 18. There are different DPHHS divisions that provide services to adults with developmental disabilities or mental illness. CFSD cannot require those other divisions to provide services to the child who has "timed out" of the foster care system, because those divisions make their own eligibility determinations under the applicable state and federal statutes and regulations for their programs.

19. At any time during an investigation, CFSD can enter into a voluntary protective services agreement with the involved parent(s). When CFSD enters into a voluntary protective services agreement, a court proceeding in which CFSD must prove it is entitled to the relief it seeks regarding the involved child is not required. The protective services agreement controls the rights and responsibilities of the parties to that agreement.

20. On December 24, 2004, Geri and Gage left the hospital in Billings and returned to Livingston, to the residence of Janice Wood.

21. On December 27, 2004, Geri and Gage, with Jeff Wood, kept an appointment for Gage's initial checkup with Dr. Peggy O'Hara, the only pediatrician in Livingston, to whom St. Vincent's had referred Geri. Dr. O'Hara directed most of her comments and inquiries to Wood, who held Gage during the visit.

22. Geri felt that Dr. O'Hara ignored her during the visit. Geri had often received similar treatment, in social as well as professional situations, from people who seemed uncomfortable with her physical limitations or who appeared to assume that those physical limitations necessarily meant that she had a limited ability to understand and to communicate with others. She did not confront the doctor about being left out of the interactions. Geri did tell Dr. O'Hara that if someone put Gage to her breast, she could breast feed Gage and hand him back. She also told Dr. O'Hara that she could not change Gage's diapers.

23. What Geri was describing to Dr. O'Hara was the fact that since she was not in her own home, her ability to care for Gage herself was very limited. Geri had arranged modifications of her home, to improve her ability to care for herself and to access all of her home from her wheelchair. She had obtained furniture she believed would allow her to provide more care for Gage (including changing his diapers) herself. One of the primary reasons why she wanted to take Gage to her home as soon as possible was so she could take a more active role in caring for her child. In any home without such adaptions, Geri's mobility and independence, and thereby her ability to provide more of her son's care herself, were substantially more limited.

24. During Gage's December 27, 2004, visit to Dr. O'Hara, Geri was not asked about and gave no indication that she was seeking or had already arranged for support services or adaptive equipment to help her parent Gage. Geri made no request for assistance in locating such equipment or services.

25. After Gage's initial checkup, Dr. O'Hara received a telephone call on December 27, 2004, from Dr. Kathleen Stevens, Medical Director of Newborn Services at St. Vincent's Hospital. Dr. Stevens called Dr. O'Hara to follow-up on Gage's discharge and referral. She told Dr. O'Hara that Geri had unrealistic expectations about living alone with Gage. Dr. Stevens told Dr. O'Hara that she had concerns because Geri could not change Gage's diapers, could not prepare bottles, could not walk and had limited use of her hands so that she could not respond appropriately to care for Gage if he was choking or needed to be burped.

26. Dr. Stevens also told Dr. O'Hara that she and the staff at St. Vincent's did not think that Geri had a well established social support system. She suggested to Dr. O'Hara that the limited hours of PCA assistance and the unspecified amount of additional assistance Geri might receive from Jeff Wood left a considerable responsibility upon the paternal grandmother, Janice Wood.

27. Dr. Stevens told Dr. O'Hara that Geri should never be alone with Gage. By the end of their telephone conversation, Dr. O'Hara agreed.

28. Neither physician had treated Geri. Both, in their limited respective interactions with Geri, appropriately focused primarily upon Gage, the patient each was treating, while paying some attention to Geri, the mother.

29. Dr. O'Hara had met Geri once and had examined Gage once. Dr. Stevens had been involved in Gage's care for 3-4 days immediately before discharging him from St. Vincent's. She had interacted with Geri for the same 3-4 days. Both doctors made assumptions about Geri's capacities based upon their observations and casual conversations and upon the reports of others, without conducting any actual examination or evaluation of Geri.

30. Both doctors lacked sufficient information and professional expertise to reach conclusions to a reasonable degree of medical certainty about how much assistance Geri required to care for their patient, Gage. However, both had legitimate concerns about the adequacy of the future care of Gage, based upon their limited knowledge of Geri's physical impairments and plans.

31. On December 28, 2004, CFSD Supervisor Barbara Maddren-Broughton[4] (in DPHHS's Livingston office) assigned Sue Anderson, a CFSD Community Social Worker, to investigate the initial report that Gage would be at substantial risk of harm when Geri brought him home. Under Maddren-Broughton's supervision, Anderson undertook an Investigative Safety Assessment (ISA). CFSD's "Investigative Safety Assessment - Field Guide" sets out CFSD's procedures for investigating reports alleging possible child neglect, to determine the safety or degree of risk to the particular child.

32. On December 28, 2004, Anderson, with Maddren-Broughton's approval, contacted WIC worker and public health nurse Mary Einsvang, knowing that Geri had agreed, at St. Vincent's, to participate in the WIC/Well Child program after returning to Livingston. Anderson wanted Einsvang's help in making an unscheduled visit to evaluate any apparent immediate danger to Gage.

33. Anderson considered this unscheduled visit urgent, both because of the content of the initial telephone report regarding risks to Gage because of Geri's

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[4] In testimony and exhibits, Maddren-Broughton is often referred to as "Barb Broughton," and such references are to Maddren-Broughton, as she is called in this decision.

disabilities and because she misinterpreted the medical information DPHHS had and concluded that Gage lost weight between his discharge from the hospital and his initial checkup with Dr. O'Hara. Gage lost weight while in the hospital (which was not unusual for a premature child), not after his discharge.

34. Einsvang cooperated by enlisting the aid of the nutritionist who had visited Geri before, arranging for a visit with Geri from "the RN from the Health Department [Einsvang] . . . to discuss nutritional concerns." The nutritionist contacted Geri and found her open to a visit from "the RN," reporting to Einsvang that although "Geri had formerly expressed distrust of medical treatment and personnel . . . she now seemed quite open to listening to suggestions." Einsvang relayed the information to Anderson. No one told Geri that a CFSD investigator would accompany Einsvang.

35. DPHHS is the State WIC agency in Montana. DPHHS makes policies and develops procedures for WIC program operations, performs management evaluations of WIC operations and provides WIC continuing education, all as part of DPHHS' responsibilities for carrying out the Montana WIC program for the United States Department of Agriculture (USDA). Those responsibilities include the obligation to keep program staff up to date about all aspects of program operations, including USDA civil rights policy and training. Anderson and Maddren-Broughton did not know, did not inquire and were not informed about WIC program nondiscrimination requirements.

36. On December 30, 2004, Anderson and Einsvang went to Janice Wood's home, where Gage and Geri were staying. Anderson met Geri for the first time. Geri was in bed, in a home that was not adapted to her power wheelchair. Geri believed, from the conversation and from the previous telephone contacts, that Anderson and Einsvang were there because Gage was premature and needed to be weighed to assure that he was gaining weight and healthy. Geri believed that the entire visit was what normally happened with premature babies. Anderson told Geri that she and Einsvang were there to help get services for her and Gage.

37. Geri spoke to them as health workers. She talked about her difficulty breast feeding, her concerns about Gage's reactions to formula, and her search for more caretakers so that she could go back to her own home, in order to live as independently as possible with Gage.

38. Einsvang examined Gage, weighed him and determined he was fine. As part of the health services of WIC, she prepared a "Care Plan Related to Infant/Child

Health," which was to weigh and to check Gage weekly and to obtain the necessary services so that Geri could take her son home. Geri agreed, and signed the care plan.

39. During the December 30, 2004, contact, Anderson had Geri sign a release authorizing CFSD to obtain and to share confidential medical information about her from various health providers, including the public health nurse, doctors, and the hospital. Anderson obtained Geri's consent and signature by telling her that the release was necessary to check about additional services to assist Geri and Gage. The authorization did not state that the released information would be used in a neglect investigation. The authorization did not consent to a release of Gage's medical information, only Geri's.

40. Geri would not have signed the release if she had known Anderson would use it for a neglect investigation. Had Geri been told that was the purpose, she would have asked Anderson and Einsvang to leave. Geri would not have signed a release for Gage's medical records without a full explanation, and would have refused to sign such a release for use in a neglect investigation.

41. CFSD could have obtained the records without Geri's consent, based upon the need to investigate the initial report of possible neglect. CFSD's usual practice is to obtain releases to get information needed for the investigation, having its workers explain truthfully the purpose for obtaining the releases. Anderson did not follow that practice in obtaining the authorization for release of protected health information from Geri.

42. When beginning an investigation of a report of possible neglect, CFSD routinely provides information about its procedures, including information contained in a handout entitled "What Happens Next."[5] Anderson did not give that handout to Geri on December 30, 2004.[6] Anderson also did not provide any information about investigative procedures or parents' rights. CFSD never furnished Geri with the handout or information about investigative procedures and parents' rights.

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[5] DPHHS knows that being the subject of a neglect investigation causes a parent significant stress, concern and anxiety. The purpose of the handbook is to make the process understandable and less difficult for parents who are subjects of such an investigation.

[6] Anderson testified that she left the handout on the dresser in the room where Geri was in bed. With no corroboration that either Janice Wood (who did not testify) or Geri ever saw, heard of or received the handout, and with Anderson concealing the true purpose of her visit and her actual job with DPHHS, her testimony was self-serving and insufficient to establish that fact.

43. After the December 30, 2004, visit, Einsvang and Anderson discussed their impressions of the visit. Einsvang thought that Geri felt that "she is being forced to stay [at Janice Wood's] house," that Geri was "trying to tell [Einsvang and Anderson] that she wants out," that "she was not able to speak freely" and that "she hopes to be able to talk" with medical or WIC personnel "alone." Einsvang also thought that Wood might be "'withholding' Gage from Geri." Anderson concurred in some of those impressions, but made no effort to investigate any of them. Anderson concluded after the December 30, 2004, visit that Gage's safety required that Geri have 24 hour a day, seven days a week, assistance, so that she would never be left alone with Gage.[7]

44. Following the December 30, 2004, visit, Einsvang telephoned Dr. O'Hara to update her on Gage's status and weight. Dr. O'Hara then called Anderson and told her that Geri should never be left alone with Gage. From December 30, 2004, to January 11, 2005, Dr. O'Hara had several conversations with Anderson and/or Maddren-Broughton to discuss Gage's safety and well-being and the perceived risks in allowing Geri and Gage to be together unattended.

45. During the investigation, Anderson relied in part upon Dr. O'Hara's concerns, which supported Anderson's initial conclusion. Anderson had received information from Dr. O'Hara in other cases and considered her a credible source.

46. Anderson used the release that Geri signed to obtain protected health care information that the release did not authorize. Anderson obtained the release for the primary purpose of getting information for the neglect investigation and used the release for that purpose. Anderson had never treated a parent under investigation who did not have a disability in the same way.

47. After her initial contact with Geri and Gage, Anderson first investigated whether this mother and child could be institutionalized together in a nursing home. Anderson made this the initial point of her investigation because in addition to concluding that Geri was incapable of caring for Gage in her own home with the assistance currently available to her, she also concluded that Geri could not be trusted to see what assistance she needed and to secure that assistance to care for Gage in her own home. In essence, after one visit and one telephone conversation

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[7] Based upon the evidence, such as the December 30, 2004, entry in Exhibit 7, CFSD's Investigative Safety Assessment, it clearly appears, and the Hearing Officer so finds, that although Dr. O'Hara and Dr. Stephens subsequently supported this conclusion, Anderson reached it without seeking or learning of the physicians' views.

with Dr. O'Hara, Anderson decided that Geri's intention to return home with Gage (her stated goal in the Care Plan she signed during the December 30, 2004, visit) and her desire to live as independently as possible with Gage were unrealistic and unsafe for Gage. Anderson's premature decision was based upon a wholly inadequate investigation.

48. The State of Montana has a basic policy to provide community-based services and to move or to keep people with disabilities out of institutionalized environments as much as possible. Several divisions of DPHHS itself are involved in implementation of this basic policy. Because Anderson had already decided that Gage could not be safely kept with Geri without institutionalization, she took no actions to determine how Geri might have Gage with her outside of an institution.

49. On January 1, 2005, Geri and her aunt Peggy Glass, who resides in Livingston, went to Billings to clean and to vacate the apartment that Geri had rented in the months preceding Gage's birth. During the trip, Peggy invited Geri to come to Peggy's home, with Gage, and stay. Peggy extended the invitation because she thought that Janice Wood had done enough and that Geri "needed to be with family." After Geri's auto accident and injuries in 1996, her family in the Livingston area–her aunt Peggy, her father (Peggy's brother) and several other of Geri's blood relatives"were always there to help" her if she needed anything. Peggy reasonably believed the family would provide the same level of help and support to Geri as a new mother. Geri accepted, but did not immediately move to Peggy's home.

50. On January 3, 2005, Maddren-Broughton and Anderson met and discussed their views on Geri. Relying upon what they then knew–Dr. O'Hara's opinion, the erroneous assumption that Gage's weight loss happened after Geri took him from St. Vincent's, and Anderson's conclusions about Geri's incapacity safely to parent Gage–Maddren-Broughton and Anderson decided that Geri was "totally dependent on someone else caring for her and now Gage." They decided that Geri should never be alone with her infant son and that CFSD should act to take the child away if that occurred. At this point, CFSD had insufficient evidence to meet its burden in a court proceeding to prove by a preponderance of the evidence that Geri being alone with Gage constituted neglect.

51. In the early hours of January 4, 2005, Geri, who had argued with Janice Wood over Gage's care, decided that she and Gage needed to move from Janice Wood's house. Geri called her father and her Aunt Peggy and arranged to go to Peggy's home. The move was accomplished that morning.

52. CFSD had not told Geri that she must give prior notice or obtain approval before she could move, with Gage, from Janice Wood's residence. CFSD had not told Geri that should she ever be alone with Gage it would be deemed grounds for immediate removal of Gage from her. In fact, CFSD had never told Geri that it was investigating her capacity to care for Gage because it had received a report that Gage was at risk of neglect if left alone in her care.

53. On January 4, 2005, Geri telephoned the Livingston DPHHS office in search of day care assistance. Her call was forwarded to Anderson. Geri left a voice mail for Anderson indicating that she was looking for day care services. Glass left Peggy Glass' phone number in the message as the return call number. To this point, Geri was not aware that she was under investigation because of possible risk of harm to Gage if he were left in her care without constant assistance. She called DPHHS in her continuing efforts to arrange adequate care so she could go home with Gage.

54. On January 4 or 5, 2005, the WIC nutritionist called Anderson and reported that Geri and Gage were no longer at Janice Wood's home, having moved to Peggy Glass' residence after a dispute between Geri and Janice Wood. Anderson asked the nutritionist (who was going to Peggy's home to visit Gage and Geri) to call if Geri and Gage were not there or if Geri was alone with Gage.

55. On January 5, 2005, Anderson returned Geri's call, as part of her investigation. Anderson already knew where Geri was now staying (Peggy Glass' residence, to which Anderson placed the call). At first, Geri did not know who Anderson was, and began to explain her physical condition and her situation, to explain why she needed to find day care services. Anderson responded by asking why Geri and Gage were no longer at Janice Wood's home. Surprised, Geri asked how Anderson knew about the move. Anderson identified herself as the person who had visited Geri and Gage with the WIC nurse the prior week. Geri then told her that she had left Janice Wood's home after a dispute with Janice.

56. Anderson demanded to know where Geri was.[8] Geri refused to answer. Anderson told Geri that she could never be alone with Gage because it was unsafe. Anderson told Geri that CFSD would call law enforcement and that the county

[8] The rapid degeneration of the phone conversation into hostility and the exchange of threats and accusations began with this demand. Demanding that Geri provide information Anderson already had could only be a tactic selected by Anderson to establish that she could and would tell Geri what to do. Geri, because of her drive for maximum possible independence, did not respond well to being told what she must and must not do. The result was predictable.

attorney could have Gage removed. Geri repeatedly said that Anderson was discriminating against her because she was disabled ("in a wheelchair"). The two were yelling at each other over the phone.

57. The phone call left Geri crying uncontrollably and hyperventilating. She was extremely frightened and wanted to "go lock the door and hide."

58. CFSD has frequently prohibited a parent from being alone with their child after DPHHS placed the child in foster care. There is no evidence that CFSD had ever imposed such a prohibition on a nondisabled parent, without first substantiating abuse or neglect, taking formal action to intervene or completing its investigation.

59. Following the January 5, 2005, telephone call from Anderson, Kirsten Gilliam, one of Geri's personal care attendants, explained to Geri that Anderson worked in child protective services. Gilliam is a licensed child care provider who had prior experience with Anderson during investigations into allegations of child abuse and neglect in other families (Anderson had called her and asked her for information in those cases). From her conversation with Gilliam, Geri realized that Anderson (and Maddren-Broughton when both came to Peggy Glass' home later that afternoon) was with "Social Services," the "people who could come and take your children."

60. After the phone call, Anderson and Maddren-Broughton called Park County Deputy County Attorney Brett Linneweber for advice about taking action to remove Gage from Geri's custody. Linneweber indicated that if it determined that Gage was at risk, CFSD had the right to remove Gage, but would need a supporting affidavit from Dr. O'Hara for the temporary custody petition that CFSD would need to file. Anderson called Dr. O'Hara, to get a letter supporting removal. Dr. O'Hara drafted and faxed a letter to CFSD in less than an hour. CFSD treated Dr. O'Hara's letter as a "supplemental or related report" of alleged child abuse or neglect of Gage.

61. There had been two other times when CFSD and Dr. O'Hara had acted so quickly. One case involved a child who had been the obvious victim of a physical beating; the other case involved a child who had been the victim of sexual abuse. In both instances, there were medical records and personal observations by Dr. O'Hara herself supporting the abuse charges. With Geri and Gage, Dr. O'Hara had no medical evidence at all to support a claim of neglect. Instead, she had second-hand information about a "social, non-medical fact," as Anderson reported it in the phone call (the change of residence), coupled with Dr. O'Hara's brief observations of Geri's

disability during the one office visit for Gage and with Dr. O'Hara's agreement with Dr. Stevens that Geri, with her disability, could not safely be alone with Gage.

62. When Anderson and Maddren-Broughton called Linneweber, they had decided that Geri was not able safely to care for the child by herself. They had also decided that the family situation was unstable and might be "volatile," because of their uncertainty about the father's involvement and because of Geri's departure from Janice Wood's home in the middle of the night.

63. Having only that same day told Geri of CFSD's concerns, Anderson (as well as Maddren-Broughton) knew virtually nothing about any plans Geri had made for caring for Gage and keeping him safe. Geri's refusal to obey Anderson's demands for information and explanation fueled the CFSD workers' urgency about getting control of Gage's care, by either forcing Geri to do what they directed or removing Gage from her custody. Anderson never did make any effort to determine the nature of the dispute between Geri and Janice Wood.

64. To get the letter from Dr. O'Hara, Anderson told her that Geri had left Janice Wood's home in the middle of the night and had gone to an undisclosed location, an incomplete and misleading statement of the facts. She told Dr. O'Hara that Geri repeatedly refused to identify where she was or who she was with, adding that CFSD "understood" that Geri was at her Aunt Peggy Glass' house, implicitly again suggesting that CFSD was not sure where Geri was, which was untrue.

65. While Anderson was contacting Dr. O'Hara, Maddren-Broughton contacted Peggy Glass to make arrangements to meet with Geri at Peggy Glass' home, where Geri and Gage were staying. Peggy Glass, unaware of CFSD's conclusion that Geri could never safely be alone with Gage, told Maddren-Broughton that she was concerned about how Geri could care for Gage at night (because Geri could not get out of bed by herself).[9]

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[9] The contrast between Peggy Glass' concern and the official concern of CFSD is striking. Peggy worried that Geri, in bed with Gage, would need help getting up in the event of an emergency. CFSD and Dr. O'Hara asserted grave concern that Geri might inadvertently roll over on Gage and smother him. Once assisted into bed, Geri could not roll inadvertently, and only with grave difficulty, if at all, without assistance. No party to this proceeding presented any evidence addressing the validity of the companion concern of CFSD–that Geri by herself could not respond should Gage choke while in bed with his mother. There is no evidence that anyone involved in this case has ever attempted to ascertain Geri's capacity to assist Gage by herself in such a circumstance. The Hearing Officer's observations during the hearing of Geri's manual dexterity and strength, consistent with other limited evidence, suggest that Geri may not be able alone to assist Gage, but this is an insufficient for a finding

66. Dr. O'Hara's letter stated that she had made a prior referral about Geri and Gage, which she had not. The letter also stated that Gage was at high risk because Geri had given birth vaginally at St. Vincent's, which was inaccurate as well as nonsensical (vaginal versus caesarian delivery had no relevance to the alleged risk of neglect). The letter also reflected the tone of Anderson's urgency, stating that Geri had moved from Janice Wood's home to an "undisclosed home." By not telling the truth to Dr. O'Hara about what she knew, Anderson had now obtained a letter that, if filed in support of a temporary emergency custody petition, would not even be entirely true to the knowledge of the doctor signing it, and would incorporate a material misrepresentation of the facts known to CFSD, made by CFSD to the affiant to obtain the affidavit, regarding the status of the child allegedly at risk. Anderson's phone conversation with Dr. O'Hara was intended to get the letter that she understood from Linneweber that CFSD would need.

67. Dr. O'Hara had moved to Livingston in 2003. When she wrote the letter requested by CFSD on January 5, 2005, she had met Geri once, during Gage's initial office visit. Dr. O'Hara had not assessed Geri and had no training and no experience in making such an assessment. She had never treated any children who had a mother with quadriplegia and had no familiarity or training in dealing with parents with those types of disabilities. Dr. O'Hara had formed impressions about Geri, from her conversations with CFSD and Dr. Stevens, and conversations with others in the community. Her impressions included the erroneous assumptions of substantiation of neglect of Gage and formal involvement of CFSD in supervision of Gage's care. In providing the letter, Dr. O'Hara believed that Geri was a reckless young adult who might try to do everything herself and, being of a belligerent nature, might refuse help or perhaps already had refused it, so that help would have to be forced upon her. Dr. O'Hara had no first-hand knowledge upon which to base her beliefs. Her only first-hand knowledge contributing to her conclusion that Gage was at "high risk" was that his mother was a quadriplegic with some ability to use of her upper extremities, who might not be able to provide sufficient care for her infant son by herself.

68. After obtaining Dr. O'Hara's letter, Anderson and Maddren-Broughton drafted a memo to Geri telling her she could never be alone with her son and she could not move back to her home without permission from CFSD. The purpose of the memo was to advise Geri of the conditions "she would have to meet to have her child remain with her." If she did not comply, CFSD, with Dr. O'Hara's letter, was ready to remove Gage from her custody immediately, although CFSD would have

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about this concern. After this liability hearing concluded, the record still does not establish by the preponderance of the evidence that it was or is unsafe for Geri to be alone with Gage.

needed more evidence than the letter to support that removal in adversarial proceedings in court.

69. Maddren-Broughton and Anderson personally delivered the CFSD memo to Geri on the afternoon of January 5, 2005, at Peggy Glass' home in Livingston, where CFSD already knew that Geri and Gage were now residing. In the January 5 meeting at Peggy Glass' home, Maddren-Broughton told Geri that "she had been turned in by a local doctor and two doctors from Billings" and that CFSD "had received letters from the doctors stating Geri was not capable of taking care of Gage" because of her physical limitations.

70. CFSD did not know and made no efforts to find out whether Geri's home was modified to improve her ability to function to care for herself and Gage. CFSD had no concern about whether Geri was in an accessible home. Requiring that Geri stay in a non-accessible home posed risks to her health and safety, including risks of "secondary disabilities" such as infections and injuries. Requiring Geri to remain in an inaccessible environment also impaired her ability safely to parent Gage.

71. During the January 5 meeting, Maddren-Broughton instructed Geri that CFSD needed written statements within 24 hours from people other than Geri attesting that those people cared for Gage, and identifying the hours during which they provided that care. Maddren-Broughton reiterated the contents of the memo, emphasizing that if Geri was ever alone with Gage, CFSD would immediately remove him from her custody. The memo indicated that Geri and Gage could not leave Peggy Glass' home unless Geri had a plan in place to address "Gage's 24 hr/7days a week care" and the plan was provided to CFSD. The memo concluded:

> If you feel you are capable of living on your own and caring for Gage by yourself, this office must have a statement from your personal physician stating you can independently care for Gage and there would not be any safety concerns.

72. The relatively brief January 5, 2005, meeting between CFSD and Geri, at Peggy Glass' home, demonstrated the adversarial positions of both the agency and the parent targeted for investigation. CFSD did not ask or attempt to find out what parenting functions Geri could perform unassisted, or what adaptive devices she had or could obtain to aid her in caring for Gage. Geri did not offer to explain or demonstrate what parenting functions she could perform unassisted or what adaptive devices she had or would obtain.

73. On January 5, 2005, Geri complained at least four separate times to Anderson and then Maddren-Broughton that CFSD was discriminating against her because of her disability. Maddren-Broughton's response was to tell her that their actions were standard process and procedure. CFSD's actions were not standard process and procedure. CFSD had no standard process and procedure to deal with a quadriplegic mother who had sole physical custody of a newborn infant. CFSD had already departed from its general standard investigative process and procedure in several respects while dealing with Geri.

74. Maddren-Broughton decided that Geri's complaints of discrimination during the January 5, 2005, contact were "nonresponsive." Maddren-Broughton decided that Geri had a brain injury (presumably as a result of the auto accident which had caused her quadriplegia) that interfered with her ability to comprehend what CFSD was telling her. Maddren-Broughton had neither the medical information nor the expertise to determine for herself that Geri had a brain injury. CFSD had no medical information supporting this conclusion and never attempted to obtain any such information.[10] CFSD took no action to assure that Geri was able, or received assistance in being able, to comprehend what she was being told.

75. Anderson and Maddren-Broughton took no action in response to Geri's complaints of disability discrimination. During the entirety of CFSD's investigation, neither Anderson nor Maddren-Broughton, nor anyone else at DPHHS, ever told Geri that she had the right to have her complaint forwarded to the DPHHS Human Resources office or have her complaint, as a participant in the WIC program, forwarded to the United States Department of Agriculture. DPHHS effectively denied Geri access to its complaint policies, and the opportunity to make complaints thereunder and seek internal investigation of CFSD's conduct.

76. According to the DPHHS Human Resources director, DPHHS has no policy or procedure on whether to tell someone who complained of discrimination about any DPHHS grievance procedure.

77. DPHHS policy states: "No qualified individual with a disability will, on the basis of disability, be excluded from participation, or be denied the benefits of services, programs or activities of a public entity, or be subject to discrimination by

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[10] Geri's testimony at hearing revealed that she indeed suffered a head injury in the auto accident, necessitating removal of bone from her skull to relieve pressure building up in her brain. There is no credible evidence that Maddren-Broughton, at the time she decided Geri had a brain injury, had even this much specific information about Geri's injuries.

any public entity." DPHHS adopted a policy to provide prompt and equitable resolution of complaints alleging any action prohibited by the U.S. Department of Justice regulations implementing Title II of the ADA. The policy affords any individual the right to file a complaint and promises that the ADA Coordinator will respond in writing to the person filing the complaint within 20 days after promptly conducting an investigation. DPHHS admitted that people who contact it for information about services are entitled to protection under discrimination laws.

78. The ADA Coordinator and staff perform their duties and responsibilities, including their primary duty to make sure DPHHS does not discriminate on the basis of disability, apparently without considering CFSD's child protection functions as subject to their scrutiny. Prior to this case, DPHHS never expressly considered or decided whether CFSD's child protection functions were subject to DPHHS's policies against disability discrimination.

79. DPHHS knows that it has duty to analyze its operations to see if it complies with Montana nondiscrimination laws. It has done no such analysis of CFSD operations for at least the last 16 years.

80. Until this case, DPHHS had never taken the position that CFSD investigations were exempt from state or federal laws prohibiting discrimination. Until this case, DPHHS understood and assumed (1) that all of its activities were supposed to be performed in a nondiscriminatory manner and (2) that DPHHS could not discriminate by denying services or denying information about services. Despite its understandings and assumptions, DPHHS acted upon the unspoken and perhaps unexamined assumption that CFSD's purpose of protecting children at possible risk of neglect and abuse was entirely outside the scope of the laws prohibiting disability discrimination.

81. During CFSD's investigation of Geri, as the subject of Report 185261, CFSD had no knowledge of how (or whether) to communicate information to persons with disabilities about protections from discrimination. CFSD staff, including its chief administrator, (Shirley Brown), its regional administrator (Kathy Ostrander), the person supervising the investigation (Maddren-Broughton) and the investigator (Anderson), did not know and had never been informed that DPHHS had a procedure for handling complaints of discrimination by persons with disabilities. CFSD staff, including Maddren-Broughton and Anderson, did not know DPHHS had an ADA coordinator or that there was a CFSD ADA liaison. At the time of the hearing, it appeared that not all CFSD staff yet knew that DPHHS had an ADA coordinator.

82. CFSD did not know what a reasonable accommodation to a person with a disability was and did not know if a failure to make a reasonable accommodation to a person with a disability could constitute a discriminatory practice. CFSD had no knowledge, awareness or understanding of, and did not think DPHHS had any duty to conduct, a fact specific analysis of a disabled individual's circumstances and the accommodations that might allow him or her to meet standards required by a DPHHS program or activity.

83. CFSD had not provided any training to any of its staff or employees of their duties or obligations under the ADA or the Human Rights Act "regarding delivery of services or investigations" and had not trained its employees in contacting or interviewing or dealing with persons with disabilities. CFSD had provided no training to its employees about making reasonable accommodations to persons with disabilities and believed, or at least asserted in the course of this proceeding, that it had no obligation to train CFSD staff or employees concerning DPHHS' disability discrimination complaint procedure or how to distribute that information to the public or to persons they contact.

84. CFSD did not know if it had any obligation, while investigating a report alleging possible child neglect, to provide reasonable accommodations to a parent with a disability in order effectively to communicate with or to interview that parent. CFSD could not say if it had any obligation during an investigation to provide reasonable accommodation in order to communicate with or to interview a parent who has a hearing or speaking disability.

85. CFSD did not consider any of its training activities to be deficient. At the time of the hearing, the DPHHS administrator responsible for supervising its ADA Coordinator and for assuring adequate training of Department staff in their ADA responsibilities did not know if the state's WIC program, administered by DPHHS, or other service programs of DPHHS were subject to the nondiscrimination provisions of the ADA.

86. CFSD considered reasonable efforts to prevent placements of children outside the home to be the same thing as reasonable accommodations to persons with disabilities. As a result of this perhaps unexamined conclusion, CFSD did no training on distinctions between reasonable efforts to prevent placement of children outside the home and reasonable accommodations to persons with disabilities, considering any difference between the two to be purely semantic.

87. On January 6, 2005, Geri arranged for Danielle Watson, Kirsten Gilliam and Peggy Glass to furnish written statements to CFSD confirming that they would assist in Geri in caring for Gage "7 days a week, 24 hours a day."

88. During its investigations into allegations of child abuse or neglect, CFSD frequently invites parents to provide safety plans. A safety plan identifies measures that the parent or the parent's support system can take to assure the child's safety. Safety plans are a means of helping parents identify and use specific means to keep the child safe. There is a template available to CFSD workers to use for a safety plan, but there is no requirement that it be used.

89. Safety plans are used frequently during CFSD investigations as a means to close investigations into alleged child abuse and neglect. CFSD uses safety plans to maintain a child in the home while ensuring the child's safety by relying upon the parent's assurances that the plan (developed by another professional or by the parent and the family) will be followed. Safety plans are a voluntary alternative to CFSD's continued direct involvement with the family.

90. The "Safety Plan" form in use when CFSD investigated Geri had been revised in October 2002 and in October 2004. The form provided:

> **Important Information About Safety Plans:** This safety plan is a specific agreement to help ensure your child(ren)'s **immediate** safety. Your decision to sign this agreement is voluntary. The custody of your child(ren) does not change under this safety plan. Signing this safety plan indicates your desire to assure that your child's safety is not threatened in the future.

91. The form also stated that the procedures to be used for a CFSD "safety plan" include identification of the report being investigated (by name and number), the name and phone numbers of the case worker and supervisor doing the investigation, a scheduled time and place to meet to "discuss the safety of your children," a notice that the parent may bring "a person of your choice" to that meeting, a description of the "specific activities" to be followed and who is responsible for each of those activities, a statement indicating that CFSD was available to answer any questions the parent had about the safety plan, a statement that the plan would be in effect until the scheduled meeting to discuss the child's safety, and provided signature lines for the parent, CFSD case worker, CFSD supervisor and others. CFSD did not use any safety plan forms in dealing with Geri.

92. CFSD's practice of using safety plans is proper when the agency provides "voluntary protective agreements." "Voluntary protective agreements," as defined by Mont. Code Ann. § 41-3-302, require a "written voluntary agreement" signed by the parent and the agency. Use of safety plans may also be proper under other circumstances consistent with law and CFSD's customary practice.

93. Proper safety plans are a reasonable method for CFSD to maintain a child in the home while ensuring the child's safety during the course of an investigation into allegations of child abuse and neglect. CFSD can reasonably request safety plans as a means of avoiding removal of a child from the home by ensuring the child's safety. Safety plans are voluntary. A parent can voluntarily choose to provide a safety plan for a child to avoid greater CFSD involvement in the family. Such a choice is not necessarily involuntary or coerced.

94. CFSD, according to the evidence in this case, had never imposed on any nondisabled parent a putative "safety plan" similar to the January 5, 2005, memo to Geri, with no opportunity to review whether or not they wanted to enter into it. CFSD did not ask Geri to enter into a voluntary safety plan, it imposed its "safety plan" upon her, following a unique procedure with unique paperwork under unique conditions.

95. The memo of January 5, 2005, delivered to Geri, did not identify any report that was being investigated. It did not provide information to Geri advising that it was her decision whether or not to enter into a safety plan. It did not set a time or place for a meeting to discuss safety concerns about Gage or inform her of her right to have a representative appear at that meeting with her. It did not apply the plan specifically until such a meeting was held. It did not inform Geri she could have any questions about the memo answered by Anderson or Maddren-Broughton. It did not provide for any signatures and was only initialed by Anderson. CFSD never worked with Geri to come up with the plan, presenting the memo of January 5 to her as an ultimatum to be followed or Gage would be removed from her custody.

96. CFSD's safety plans for children average six months in length. No time limit for CFSD's requirement that Geri never be alone with Gage was included in the January 5, 2005, memo. As far as the evidence in this case reflects, CFSD has never advised Geri that the requirement no longer applies, and apparently still stands ready to remove Gage from her custody should she ever be found to be alone with her son for any extended period. Although CFSD presented a number of testimonial denials during hearing, CFSD told Geri, without any limitations, that it would remove Gage should she ever be alone with him. At the time of this hearing, Geri reasonably

believed that CFSD still stood ready to remove Gage if it ever could prove that she was alone with him for any extended period.

97. Based upon the preceding findings, the January 5, 2005, memo was not an invitation from CFSD to Geri to provide a safety plan for Gage.

98. On January 6, 2005, Geri arranged for Danielle Watson, Kirsten Gilliam and Peggy Glass to furnish written statements to CFSD confirming that they would assist Geri in caring for Gage "7 days a week, 24 hours a day."

99. On January 7, 2005, Geri contacted attorney Kevin Brown to represent her in dealing with CFSD. Brown faxed a letter that same day to Anderson advising that he represented Geri and asking for a "list of services available to Geri so she can return to her home with Gage." CFSD did not respond to the request, requesting first that Geri provide a signed release authorizing her attorney to obtain information concerning her case. CFSD's conduct was in conformity with the law.

100. The DPHHS Hotline received a false report on January 7, 2005, in which the reporter claimed that a friend had told him that Geri had Gage in a bar on that date. Anderson confirmed on January 12, 2005, that at the time Geri allegedly had Gage in a bar, Gage's aunt, Peggy Glass, chief dispatcher for city-county law enforcement, had Gage with her at her work.

101. CFSD should have conducted a separate safety assessment of the report, according to its Field Guide. Had it done so, then by statute and regulation, CFSD would have determined that the report was "unfounded." All records of an initial report, the allegations of which are determined to be unfounded, are destroyed within 30 days after the determination is made. Mont. Code Ann. § 41-3-202(5)(b). Instead, for no credible reason provided at hearing, CFSD maintained records of the unfounded report in the file for the original report, instead of making a separate determination of whether the allegations of the January 7, 2005, were unsubstantiated, substantiated or unfounded.

102. On January 10, 2005, Dr. O'Hara, at her second and final meeting with Geri, discovered that she was no longer Gage's pediatrician.

103. On various occasions, Anderson and Maddren-Broughton promised Geri that they would make "every effort to provide Geri with services so that her child could remain with her." According to Maddren-Broughton, CFSD called a meeting of

people they considered "professionals" to a meeting on January 11, 2005, for that purpose. Anderson contacted the attendees and invited them to the meeting.

104. Representatives of numerous agencies providing various social services in the Livingston area attended. Maddren-Broughton, Anderson and Dr. O'Hara attended. Spectrum Medical case managers Barb Hilton and Taryn Kovac, who provided case management services for Geri's Medicaid Senior and Long Term Care Home and Community Based services, attended. Lalla Chadwick, regional program officer for the Department's Senior and Long Term Care Division attended. Rose Young, an employee of Family Outreach, which provided services to disabled children, attended. Mary Einsvang, Park County Public Health nurse, who had provided Anderson with "cover" for her initial home investigative visit to Geri, also attended. Geri was not invited. Her actual personal care attendants were not invited. Her attorney was not invited. CFSD did not advise any of these persons about the meeting.[11]

105. The focus of the January 11, 2005, meeting was to discuss what to do about Geri and Gage. At the meeting, Kovac, Geri's case manager from Spectrum Medical, pressed CFSD about how old Gage would need to be before CFSD was no longer concerned about his safety–5 years? 10 years? 15 years? Maddren-Broughton responded that CFSD would be concerned until Gage was 18. No other term or length for any "safety plan" was discussed at that meeting.

106. During the January 11, 2005, meeting, CFSD considered whether Geri and Gage could be placed (apparently without Geri's consent being necessary) in a nursing home together. This strategy appears to have been in conflict with and in disregard of the state's basic policy "to provide community-based services and to move people out of institutionalized environments," in which DPHHS itself is centrally involved. Kovac considered the strategy absolutely inappropriate, and contrasted it with the state's basic policy:

> You do not raise your child in a nursing home simply because you're in a wheelchair. The purpose of the Medicaid waiver Home and

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[11] Maddren-Broughton's testimony that Geri would have been welcome at the meeting was incredible. Anderson testified initially that she did not know why Geri was not invited, then testified that it was an investigative meeting and she "rarely, if ever," invited parents to that type of meeting. Kovac testified that Geri was not invited because it was a "closed meeting" the purpose of which was to talk about the possibility of removing Gage from Geri, who was therefore not invited. Kovac also testified that people were talking about Geri "in such a negative way" that it was unlikely she would be invited to hear or participate in such a discussion.

> Community Based Services is to keep people out of nursing homes. . . . It's extremely disempowering to live your life in a nursing home simply because you're in a wheelchair. . . . .
>
> [A]ssisted living is better . . . living in your own home is better; let's be creative, let's find a way to have people have their independence and live in their home.

107. Maddren-Broughton considered Kovac to be impertinent and disruptive, interfering with the proper conduct of the meeting.

108. Anderson, who invited the attendees, never checked whether any of them had any qualifications for dealing with mothers with disabilities. Neither Anderson nor Maddren-Broughton had any prior contact with Geri before the abuse/neglect investigation, and neither had any experience dealing with quadriplegic parents of infants. Dr. O'Hara admitted having no expertise or experience or familiarity in dealing with mothers with disabilities like Geri's, and had spent a total of less than an hour with Geri while acting as Gage's pediatrician. Kovac was Geri's case manager from Spectrum Medical, but had not yet met Geri. Young from Family Outreach did not know Geri and had never met her. Lalla Chadwick apparently had provided no direct services to Geri, although Maddren-Broughton thought she was in a position to be "aware of services" and "familiar with Geri." It is unclear what Chadwick actually knew about Geri or any services available to her. It is also unclear what pertinent expertise Hilton had and equally unclear what actual contacts, if any, Hilton had with Geri.

109. Whether there were services available to Geri from sources other than CFSD to assist Geri in caring for Gage at home, and how Geri might seek such services, was not an issue of concern during the January 11, 2005, meeting.

110. Maddren-Broughton initiated a discussion during the meeting about whether Gage should be put up for adoption and whether the adoption should be open or closed. The written report of the meeting, prepared by Anderson and Maddren-Broughton, does not mention this discussion. Anderson suggested that Jeff Wood could take custody of Gage if he acknowledged his paternity, despite the fact that Wood was on the violent offender list. Anderson also reported that Geri had gotten pregnant "against medical advice," which was untrue.[12] Anderson also reported a statement she attributed to Chadwick that Geri had sent a letter to the

[12] See Finding 6 herein.

governor saying she had been raped. The record in this case is devoid of any substantiation either that Chadwick made the statement or that it was true. Maddren-Broughton claimed that this statement was "relevant to a caretaker." CFSD made no effort to investigate and either to verify or to correct this statement in the official investigative record. Anderson also reported that "each person" at the meeting had "noted that Geri's decisions, both for herself and now for Gage, are not based in reality," although the evidence in this case shows only that Anderson, Maddren-Broughton and Dr. O'Hara held those opinions. Kovac never reached that conclusion and made no such statements. Young indicated no such opinion. Chadwick, Einsvang and Hilton did not testify.

111. The January 11, 2005, meeting concluded with Anderson stating that CFSD would continue with spot-checks (to see if Geri was ever alone with Gage) and would require Geri to provide a 24 hour/7 days a week/18 year plan for Gage.

112. On January 12, 2005, Maddren-Broughton and Anderson met personally with Geri to advise her of the January 11 meeting. Two of Geri's home care attendants, Gilliam and Watson, were present. CFSD did not notify Geri's attorney of that meeting. The excuse that CFSD had not yet received a release from Geri to provide information to her attorney was not a credible explanation for this failure, particularly since CFSD had invited Young to the January 11, 2005, meeting, at which confidential information about Geri and Gage was discussed, even though it had no authorization to share confidential or private information about Geri and Gage with Young ***and*** CFSD later still had no release from Geri to provide information to her attorney when Maddren-Broughton and Anderson met with Geri and others, including her attorney, on January 31, 2005, and did not insist the attorney leave, because Maddren-Broughton then "felt like he was there on Geri's behalf." CFSD presented no evidence that it had ever acted toward an attorney representing a nondisabled parent in a similarly inconsistent fashion.

113. At the January 12 meeting, Maddren-Broughton told Geri they had done research and there were no services to provide 24-hour care for Gage and her. Maddren-Broughton reiterated CFSD's position that Geri was unable to care for Gage on her own and that Geri must have 24-hour assistance caring for Gage. Geri disagreed and asked how long CFSD would require her to have someone ever present to assist with Gage. Maddren-Broughton and Anderson told her that would be required for at least 10 to 12 years. Maddren-Broughton told Geri that CFSD needed a permanent plan for Gage's care in the CFSD office by January 31, 2005. Maddren-Broughton also told Geri she could either get someone to move in who could and would provide care for Geri and 24-hour care for Gage or allow a family

member to obtain guardianship of Gage until he was 10-12 years old. Geri again disagreed and rejected guardianship as an option. At the conclusion of the meeting, Maddren-Broughton reiterated that CFSD required Geri's permanent plan for Gage's 24-hour care in their office by January 31, 2005, threatening Geri with court action if she did not comply.

114. The "permanent plan of care" that CFSD demanded of Geri during the January 12, 2005, meeting was an unrealistic and impossible demand to meet. CFSD has never placed such a condition on any parent except Geri during any abuse/neglect investigation. CFSD has the power to require permanency plans of care after a report of neglect or abuse has been substantiated, a child has been removed from the parents and DPHHS has taken custody of that child. In demanding a "permanent plan of care" from Geri on January 12, 2005, CFSD treated Geri unlike any other parent who was the subject of an ongoing abuse/neglect investigation.

115. When meeting with Geri, Maddren-Broughton and Anderson directed most of their statements to other persons present, rather than directly to Geri. The practice of directing statements to a nondisabled person when attempting to have a conversation with a person with a disability is indicative of a lack of experience and training in working with disabled persons, resulting in an assumption that the person with a disability is unable to speak for himself or herself. More likely than not, that same assumption was reflected in Maddren-Broughton's remarkable conclusion, without the benefit of any pertinent medical documentation or medical expertise, that Geri suffered from a brain injury that prevented her from understanding what she was being told.

116. On January 18, 2005, Taryn Kovac met with Geri. Geri agreed that Kovac would work to help Geri meet CFSD's requirements, in order to keep custody of Gage and keep the family intact. Within 48 hours, Kovac helped Geri make contact with the National Center for Parents with Disabilities, a.k.a. "Through the Looking Glass" or "TLG," for technical and legal assistance in determining what resources were available to her as a mother with a disability. Over the next two weeks, Kovac would contact a dozen or more resources who had experience in helping mothers with disabilities care for children, in addition to TLG. The contacts included a number of DPHHS personnel, including staff in Great Falls, Lame Deer and Region 5, and included people who had assisted other mothers with similar disabilities where CFSD had not acted as Maddren-Broughton and Anderson had. Kovac was also in regular contact with Geri and her care providers, as well as her legal counsel, in trying to respond to the CFSD demands. The greatest difficulty that Kovac had during the period was in dealing with or even reaching Anderson or

Maddren-Broughton. Attempts to reach either Anderson or Maddren-Broughton just days before the deadline resulted in Kovac being cut off, transferred to other agencies, or hung up on before she could speak to either one.

117. On January 24, 2005, at Dr. O'Hara's direction, one of her office staff called Maddren-Broughton to report that Geri and Gage had missed a follow-up appointment with a cardiologist in Billings. Maddren-Broughton, without first checking to find out what had happened regarding the appointment, directed that the missed appointment be reported to the child abuse hot line. CFSD did not treat the report that Maddren-Broughton instructed Dr. O'Hara's office to make as an independent report of possible abuse or neglect. CFSD treated it as another "supplemental or related report" of abuse or neglect of Gage, including it in the investigative file of the original December 23, 2004, report.

118. On January 25, 2005, Barbara Hilton, Glass' case manager from Spectrum Medical, contacted Maddren-Broughton for clarification on the length of time the plan was needed. Maddren-Broughton agreed that there did not need to be a written plan submitted immediately for 18 years, covering Gage's care 24/7, but that in addition to an immediate 24/7 plan, Glass had to provide options of how she could safely provide care in the future.

119. On January 25, 2005, Kovac and Hilton met with Chadwick about Geri. Chadwick worked for DPHHS as the Senior Long Term Care Regional Program Officer. At that meeting, Kovac presented observations of possible discrimination by CFSD and Geri's complaints that CFSD was making demands on her based "solely on the fact that she was in a wheelchair." Chadwick responded by telling Kovac to be "more objective." Chadwick never informed Kovac or Geri about any DPHHS grievance procedure or any ADA complaint resolution process. There is no evidence that Chadwick took any action regarding the reports and complaints of staff engaging in disability discrimination against Geri.

120. On January 26, 2005, a case conference was convened with Glass, Gage, Gilliam, Watson, Peggy Glass, Chadwick, Hilton and Kovac. The purpose of the meeting was to develop a plan for Gage's care, to be provided to CFSD. Chadwick contacted Maddren-Broughton during the meeting to notify CFSD that the meeting was taking place and that Spectrum Medical would be buying some adaptive equipment. Chadwick arranged for Maddren-Broughton and Anderson to meet with the group on January 31, 2005.

121. During the January 26 meeting, the group developed a six-month plan at the suggestion of Kevin Brown to Kovac. Kovac also developed a sheet of questions to ask Maddren-Broughton and Anderson at the January 31, 2005, meeting.

122. The January 31, 2005, meeting at Peggy Glass' house was attended by Glass, Peggy Glass, Watson, Gilliam, Hilton, Kovac, Chadwick, Maddren-Broughton and Anderson, as well as attorney Joe Howard from Kevin Brown's law firm, and Glass' mother, Shirley Glass. Kovac presented CFSD with a six-month plan of care for Gage. Kovac and Peggy Glass asked a series of questions regarding what would happen if Gage were removed from Glass. Anderson and Maddren-Broughton answered the questions. Kovac then had Anderson review her notes to be sure they both had the same understanding of CFSD's responses. CFSD agreed that it would accept the six-month plan of care if and when Glass' doctor and Gage's pediatrician signed off on it.

123. At the January 31, 2005, meeting, Anderson and Maddren-Broughton asked about Gage's January 24, 2005, missed appointment in Billings, and discovered that Geri had rescheduled the appointment for January 27, 2005, because she could not arrange transportation on January 24. CFSD confirmed that the cardiologist had seen Gage on January 27.

124. The information explaining the missed January 24 appointment was not included in CFSD's record of the January 31, 2005, meeting. Because CFSD had included the report of possible neglect that it had directed Dr. O'Hara's office to make about the missed appointment as a "supplemental or related report" of abuse or neglect of Gage, CFSD now took no further action regarding that report, instead of closing it as at least unsubstantiated, if not unfounded, as would have been proper had it been treated as an independent report of possible abuse and neglect.

125. The six-month plan provided that: (1) Geri would complete CPR and First Aid training; (2) Geri would begin occupational therapy to help her with her parenting and to maximize her parenting capacity; (3) Kovac would continue to try to access available resources to assist Geri; (4) Geri would develop a safety plan to provide her with back up for parenting tasks she had not yet mastered, including a Lifeline with first and second responders, taking into account geographic barriers. The proposed plan would allow Glass to be alone with Gage when necessary, though not for very long periods of time. The plan contemplated regular revisions and updates as Gage developed and learned new skills.

126. On February 7, 2005, Anderson sent a follow-up letter to Geri confirming that upon medical review and approval by both Geri's doctor and Gage's pediatrician of the six-month plan, CFSD would be able to close its investigation into the December 23, 2004, report of risk of abuse or neglect. The letter requested that the doctor's statement be provided by Friday, February 18, 2005, in order to avoid a higher level of intervention by CFSD.

127. During February, Geri located a new pediatrician, Dr. Eric Livers. Dr. Livers was located in Bozeman and had 25 years of practice. Geri had her first appointment with him on February 14, 2005. Dr. Livers had experience with mothers with disabilities somewhat similar to Geri's. In their first meeting, Dr. Livers did a general assessment of Geri's physical capacities, to gauge her dexterity and upper body strength, as part of his assessment of Geri's ability to care for Gage. Dr. Livers knew there were no prevailing opinions in the medical community that a mother with Geri's disabilities either was unable to care for a child or could not be alone with her infant. He found that Geri understood she had serious physical limitations, that she wanted to live as independently as possible and that she had reasonable and realistic expectations in that regard in terms of being a mother. Dr. Livers also examined Gage and found he was "growing up, developing, thriving."

128. During the week of February 14, 2005, a reporter from the *Billings Gazette* interviewed Geri about her experiences with CFSD.

129. On February 14, 2005, Kevin Brown sent a release from Glass to CFSD so that CFSD could share information with him. It was received by CFSD on February 16, 2005.

130. Beginning on February 16, 2005, Anderson and Maddren-Broughton attempted unsuccessfully to speak with Dr. Livers.

131. Beginning on February 16, 2005, Kovac tried to contact Anderson and Maddren-Broughton to report Geri's initial meeting with Dr. Livers and to request an extension of the February 18, 2005, deadline set by CFSD. Kovac again had difficulties reaching either Anderson or Maddren-Broughton, being hung up on and transferred to dead line extensions.

132. Geri, her family, Kovac and her attorneys continued to prepare for a possible removal action, with Peggy Glass obtaining the necessary background checks to be available if CFSD acted to remove Gage from Geri's custody and place him.

133. Kovac eventually reached Maddren-Broughton, who advised that CFSD would not "penalize" Geri because CFSD had not talked with Dr. Livers by the deadline.

134. On February 20, 2005, the *Billings Gazette* contained a front page story about the case of Geri and Gage Glass and CFSD. The article detailed Geri's background, the circumstances of her disability, and her view that she was being denied the opportunity to raise her son without interference by DPHHS and that CFSD was treating her unlike any nondisabled parent.

135. The article got the immediate attention of the top administrators at DPHHS, including the DPHHS Director, Deputy Director, the Director's Administrative Officer, the top CFSD Administrator, the Region 5 CFSD Administrator and the DPHHS public relations officer. In various combinations, they had meetings and exchanged e-mails about Geri and Gage, primarily concerning the public image of DPHHS, without addressing the substance or handling of Geri's discrimination complaint.

136. After the publication of the Gazette article on February 20, 2005, CFSD Administrator Shirley K. Brown met with then Department Director Robert Wynia and with Deputy Director John Chappuis and Public Information Officer Shirley Gayle to discuss the Glass case. Following the meeting, Brown sent an e-mail indicating that Deputy Director Chappuis had indicated that "there may be some Medicaid services that could be provided under the waiver to keep the baby with the mother." The e-mail further stated that Chappuis "asked that before we make the decision to place the child in out-of-home care that we give John a chance to determine if any additional Medicaid services are available."

137. On February 22, 2005, Maddren-Broughton responded to the internal inquiries provoked by the *Gazette* article by writing an internal memo about the investigation. Exhibit 15. In that memo, Maddren-Broughton reported that Geri had a "brain injury" that "sometimes seems to interfer [sic] with her comprehending our communications." She also reported that "Geri refused to accept any referrals from hospital staff upon her discharge," which CFSD knew to be untrue.

138. Dr. Livers visited with CFSD by phone on February 22, 2005. Without actually approving the six-month plan, he said that over the six months it should become clearer to Geri and everyone else what she could and couldn't do. Dr. Livers assured CFSD that if he had concerns about Gage, he would report those concerns to CFSD. He also indicated that he would look over the plan and would fax back

something in writing approving it. Dr. Livers had not agreed to sign off on any care plan that permitted Geri to be alone with Gage. He indicated that he wanted and required more time to see Geri's strengths and weaknesses in handling Gage's care. He wanted Geri to return to her own home with 24 hour assistance, to see when she would and would not need help parenting during particular hours of the day. He viewed Gage's development as a child and Geri's as a mother as a "work in progress."

139. On March 7, 2005, at another meeting with Glass, her attorney and others involved in the ongoing process (***cf.*** Finding 121), CFSD advised that its staff had visited with Dr. Livers and that he had approved the six-month plan. CFSD advised that it would close its investigation into the December 2004 report of risk of neglect of Gage (and the "supplemental or related reports" that otherwise would already have been closed as unsubstantiated or unfounded). This would still mean that unless and until Dr. Livers approved Geri being alone with Gage, a subsequent report of such an event could trigger a new investigation and (according to what CFSD had consistently told Geri) an immediate removal of Gage from her custody.

140. Apparently after that meeting, but also on March 7, 2005, expecting written approval from Dr. Livers, Anderson wrote a letter to Geri (which references the March 7 meeting with Geri) confirming she would be closing the investigation into the December 2004 report of possible abuse or neglect. That same day, Anderson and Maddren-Broughton signed and closed the December 2004, report of risk of neglect of Gage, finding that Gage was "safe," that "no follow-up [was] required," and that there was a lack of credible information to support any allegations that Geri was unwilling or unable to meet Gage's immediate needs or protect him from danger or serious harm. CFSD then provided copies of the investigative case file and notes to Geri's attorney.

141. On March 8, 2005, Dr. Livers faxed a handwritten note to CFSD approving a trial return of Glass and Gage to her home for a period of three to four weeks with 24/7 assistance from qualified helpers.

142. CFSD has had no further direct involvement with Glass. CFSD workers declined to attend a subsequent meeting with Dr. Livers because there was no open report on Glass. When other rather obviously groundless reports of possible neglect or abuse have been made to CFSD, its staff has contacted Geri or her case manager Kovac for a response and followed up with letters documenting the report and stating that no action was being taken.

143. Although the DPHHS Deputy Director had advised CFSD of possible additional services for Geri and Gage on February 22, 2005, no one at DPHHS ever told Geri about that possibility.[13] The evidentiary record contains no explanation either of that failure or the failure to advise Geri or her counsel that CFSD would not remove Gage from Geri until the director or deputy director had an opportunity to review such a decision.

144. CFSD has never taken any action regarding Geri's repeated complaints that she was discriminated against because of her disability. DPHHS in its entirety has never taken any action on those complaints, while defending against this complaint. Testimony that DPHHS and/or CFSD thought the complaints were resolved by closure of the investigation into the December 2004 report of risk of neglect was and remains incredible.

145. CFSD never treated Jeff Wood as a subject of the original report of risk of child abuse and neglect of Gage and never investigated Wood. Wood is not a person with a disability. As already noted, CFSD considered him an acceptable candidate for taking custody of Gage. Wood was on the state's list of registered violent offenders, although he had no history of violent offenses against minors.

146. On August 18, 2005, Geri had an accessible changing table and an accessible crib installed in her home. At about that time, Dr. Livers approved Geri being alone with Gage in the home during the day in the hours after her PCA had left until her night time attendant came to the home, as long as she had her cell phone immediately accessible and had someone immediately available to respond to assist Gage in case of an emergency.

147. At the time of the hearing, Gage was healthy, growing up, developing and thriving. Dr. Livers reported that same status for Gage at two months, four months, six months and 12 months. Dr. Livers also reported that although Geri does have significant limitations due to her disability in terms of bending, walking and other activities impaired by her physical condition and that she cannot "lift a heavy child off the floor, run out after him through the front door . . . anything involving and having to do work in a bend position," but that she can and does "change [her son's] diapers, feed him, talk to him, sing to him, love him." Dr. Livers reports that Geri can "do those [things] just fine."

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[13] It appears that counsel for Glass obtained a copy of the e-mail either in the copy of the investigative file provided after closure of the investigation or in discovery in this case.

148. Geri's parenting of Gage does remain a work in progress–her ability to care for him will change month by month as his needs, abilities and mobility change and as his temperament manifests through his maturation. There is no evidence that Dr. Livers or any other physician has been willing to take the risk of guaranteeing Gage's safety, as CFSD demanded.

149. It is entirely reasonable to expect parents to have plans of how they expect to care for their children until those children are grown. It was not reasonable for CFSD to require Geri, in 2005, to present such plans, addressing a period of years, for government approval. It was also not reasonable to force Geri to choose between presenting such plans or litigating her fitness as a parent after CFSD removed Gage from her custody. That was the choice CFSD presented to Geri in 2005. It remains the potential choice which CFSD could again present to her if she is found to be alone with Gage to any greater extent than expressly permitted by Dr. Livers.

150. Geri reasonably believes that she is still at risk of losing her child if CFSD receives and is able to substantiate a report that she has been alone with Gage beyond what Dr. Livers has expressly approved. Should CFSD receive such a report, it appears that it will investigate and probably will, upon substantiation of that report, commence action to remove Gage from Geri's custody unless Geri satisfies CFSD that Gage is not at risk. In other words, unless the concern of upper management about serious public relations and political repercussions has permanently curbed the enthusiasm of local CFSD staff, they may still view Geri as incapable of parenting Gage without 24/7 assistance except to the extent that Geri provides medical verification that she can safely parent Gage without such assistance. Since the only such verification to date is very limited, the underlying issue has not been resolved, and could arise again at any time.

151. DPHHS was exercising the police powers of the state in conducting its investigation of the risk that Gage would be abused or neglected because Geri was quadriplegic. In the course of its investigation, CFSD never obtained evidence that Geri ever engaged in any act of neglect and CFSD never obtained evidence that Gage was ever subject to any act of neglect. CFSD understood or should have understood, upon reasonable investigation, that Geri always intended to take every action to take care of her son and that she did take every action to take care of her son.

152. While CFSD was investigating Geri, DPHHS had an obligation to make available information regarding regulations concerning nondiscrimination on the basis of disability in state and local government services and the applicability of those

regulations to the services, programs and activities of DPHHS. DPHHS had an obligation and responsibility to make that information available to interested persons in such manner as the DPHHS director determined necessary to apprise those persons of the protections against discrimination based on disability. DPHHS did not discharge those obligations during this investigation.

153. While CFSD was investigating Geri, DPHHS had an obligation and responsibility: (a) to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under laws and regulations regarding nondiscrimination on the basis of disability in state and local government services, including the investigation of any complaint communicated to it alleging noncompliance with its obligations regarding nondiscrimination on the basis of disability in state and local government services or alleging any actions that would be prohibited by laws or regulations governing nondiscrimination on the basis of disability in state and local government services; (b) to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by laws and regulations regarding nondiscrimination on the basis of disability in state and local government services. DPHHS adopted its Human Resource Policy #110 for that purpose. The complaint resolution or grievance procedure set out in that policy was one of the services or opportunities provided by the Department to people of all sorts to make complaints and have them processed and possibly resolved. DPHHS did not discharge those obligations during this investigation.

154. While CFSD was investigating Geri, DPHHS had an obligation to assure that none of the investigative personnel, for lack of training, allowed animosity toward Geri, because she was resisting CFSD's intrusion into her family and asserting that CFSD was discriminating against her because of disability, to influence the course and direction of the investigation. DPHHS did not discharge those obligations during this investigation.

155. DPHHS discriminated against Geri because of disability and retaliated against her because she resisted the discrimination. By association, the disability discrimination was also directed against Gage.

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IV. OPINION[14]

A. Montana Law Prohibits Disability Discrimination in CFSD Abuse and Neglect Investigations.

Montana law prohibits both denial of government services to a person because of disability, Mont. Code Ann. § 49-2-308(1)(a), and discrimination in performance of governmental services because of disability, Mont. Code Ann. § 49-3-205(1). Those prohibitions coincide with "the policy of the state to encourage and enable the . . . physically disabled to participate fully in the social and economic life of the state." Mont. Code Ann. § 49-4-201; *Johnson v. G.F. Pub. Sch.*, HR 9504007138 (Aug. 1998), pp. 12-13, ln. 2; ***affirmed***, *Great Falls Public Schools v. Johnson*, 2001 MT 95, 305 Mont. 200, 26 P.3d 734. No law, regulation or decision exempts DPHHS, either entirely or specifically within CFSD from either those obligations or that policy.

In this present case, Geri Glass, on her own behalf and on behalf of her infant son, Gage Glass, charged that CFSD discriminated against both of them because of her disability by (1) treating her less favorably than other parents subjected to neglect investigations and (2) denying her government services (fair assessment of her individual ability, with or without accommodation of her disability, to parent Gage and information about and access to discrimination complaint processes within DPHHS) during the course of that investigation. She also charged that DPHHS retaliated against her during that investigation because she resisted what she reasonably believed were discriminatory acts against her because of her disability. All of her claims involve the method of investigation rather than the fact that CFSD did investigate multiple reports of neglect or risk of neglect of Gage.[15]

To prove that a state agency engaged in disability discrimination in its services, programs or activities, a charging party must show that:

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[14] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661. The Hearing Officer also incorporates by reference the March 28, 2006, motions order, regarding legal issues in ths case.

[15] CFSD must investigate neglect reports even when the alleged neglect results from disability. Mont. Code Ann. § 41-3-202 mandates assessment of and appropriate response to every report of abuse or neglect. Montana's discrimination laws, read in harmony with this statute, do not exclude reports of neglect actually or potentially due to disability from CFSD's statutory duty, and do not exclude CFSD's investigations from the prohibitions against illegal discrimination.

> (1) [H]e "is an individual with a disability"; (2) he "is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities"; (3) he "was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity"; and (4) "such exclusion, denial of benefits, or discrimination was by reason of [his] disability." *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (***per curiam***), ***cert. denied***, 538 U.S. 921, 155 L. Ed. 2d 311, 123 S. Ct. 1570 (2003).

McGary v. City of Portland (9th Cir. 2004), 386 F.3d 1259; ***see also***, Admin. R. Mont. 24.9.610; *Townsend v. Quasim* (9th Cir. 2003), 328 F.3d 511; *Duvall v. County of Kitsap* (9th Cir. 2001), 260 F.3d 1124; *Helen L. v. DiDairo* (3rd Cir. 1995), 46 F.3rd 325.

In addition, an agency's policy or practices that place upon a person with a disability a burden "in a manner different from and greater than it burden[s the] nondisabled" is illegal discrimination if the agency fails to modify those activities to reasonably accommodate the person with a disability. *McGary* ***at*** 1265 ("state action that disproportionately burdens the disabled because of their unique needs remains actionable"), ***citing*** *Crowder v. Kitagawa* (9th Cir. 1996), 81 F.3d 1480, 1484 .

The Montana Supreme Court has not decided whether the Americans with Disabilities Act (ADA), a primary federal law against disability discrimination, applies to Montana parental rights termination proceedings based on alleged neglect of minor children by their parents. ***E.g.***, *In re J.B.K.*, ¶¶ 24-25, 2004 MT 202, 322 Mont. 286, 95 P.3d 699, much less whether Montana law contains such a prohibition:

> We have not addressed whether the ADA applies to parental termination proceedings in Montana. ***See*** *In re A.M.*, 2001 MT 60, ¶66, 304 Mont. 379, 22 P.3d 185. Many courts addressing the issue have held the ADA does not directly apply to termination proceedings, either because the ADA creates a separate right of action or because termination proceedings are not among the public "services, programs, or activities" described in 42 U.S.C. § 12132. ***See, e.g.***, *In re Doe* (Haw. 2002), 100 Haw. 335, 60 P.3d 285, 291; *In re B.S.* (Vt. 1997), 166 Vt. 345, 693 A.2d 716, 720. A few courts have applied the ADA to a state agency's provision of services prior to a termination proceeding, but have noted a parent must raise such a claim in a timely manner so

that reasonable accommodations may be made. ***See, e.g.***, *In re Adoption of Gregory* (Mass. 2001), 434 Mass. 117, 747 N.E.2d 120, 126-27. One court suggested the ADA may be raised as an affirmative defense in a termination proceeding, but held the mother waived the defense by failing to plead it. *In re C.M.* (Tex. App. 1999), 996 S.W.2d 269, 270.

Other courts have declined to directly address whether the ADA applies to termination proceedings. For example, the Washington Court of Appeals rejected a claim by developmentally disabled parents that the state agency's failure to provide specialized parenting classes violated the ADA. That court determined the agency had provided all reasonably available services and the services were modified to accommodate the parents' specific disabilities. It concluded that the agency's efforts satisfied state statutory requirements and resulted in "reasonable accommodation" of the parents' disabilities. *In re Welfare of A.J.R.* (Wash. App. 1995), 78 Wn. App. 222, 896 P.2d 1298, 1302. In addressing a mother's assertion of an ADA violation based on a failure to offer her services specifically tailored to her cognitive skills, the Maine Supreme Court merely determined that the record belied the mother's claim of lack of services tailored to her needs and established the agency had "offered a number of services that took [the mother's] pace and cognitive skills into account." *In re Angel B.* (Me. 1995), 659 A.2d 277, 279. Like the Washington and Maine courts, we need not directly address whether the ADA applies to termination proceedings in the present case.

The Department of Labor and Industry, on the other hand, has refused to hold, as a matter of law, that the Montana Human Rights Act and the Government Code of Fair Practices Act do not address discriminatory exercise of police power by state or local governments because of disability. *Olsen v. City of Bozeman*, "Final Agency Decision" (9/17/2003), Human Rights Complaint No. 0035010163, pp. 8 and 11.

Ultimately, both *Olsen* and *J.B.K.*, avoided deciding whether discrimination laws applied to particular exercises of the state's police power, because the actual facts in both cases did not show any illegal discrimination.

In *Olsen*, the claim was that the officer arresting Olsen failed to accommodate his disability during the arrest. Because Olsen failed to prove that he had timely and

adequately notified the officer of the disability, no further inquiry into the legal basis of the disability discrimination claim was necessary. Thus, the department did not decide whether a state law claim of disability discrimination lies against the government for exercising its police power, in arresting a citizen, less favorably because of disability.

In *J.B.K. at* ¶28, the Court decided that "the Department offered . . . every available service, and . . . attempted to accommodate [the] disability" and that the further accommodation the parent sought would not have permitted her to become capable of parenting. Since DPHHS had taken the parent's disability into account, the Court concluded that "we need not directly address whether the ADA applies to termination proceedings in the present case." *J.B.K. at* ¶28.

Many of the cases cited in *J.B.K.* cited similar factual bases for avoiding deciding a legal issue of first impression. The Washington Appeals Court found that the Washington agency in its case had provided "all reasonably available services . . . modified to accommodate the parents' specific disabilities" which had "satisfied state statutory requirements and resulted in 'reasonable accommodation' of the parents' disabilities." *In re Welfare of A.J.R.*, 896 P.2d ***at*** 1302, ***quoted at*** *J.B.K.* ***at*** ¶25. Likewise, the Maine Supreme Court concluded that Maine agency in that case had "offered a number of services that took [the mother's] pace and cognitive skills into account," rejecting the claim of failure to accommodate without deciding whether the state had a legal duty to provide a reasonable accommodation. *In re Angel B.*, 659 A.2d ***at*** 279, ***quoted in*** *J.B.K.* ***at*** ¶25.

If as a matter of law the ADA and the state's discrimination laws did not regulate exercises of the police power for child protection action by DPHHS, the Montana Supreme Court could readily have joined the "many courts addressing the issue" (*J.B.K.* ***at*** ¶24) who had so held. Declining to rule on whether discrimination laws do regulate exercises of the police power for child protection action by DPHHS, because DPHHS provided appropriate disability accommodations, suggests that the discrimination laws might well apply if there actually were discrimination.

Like Montana's discrimination laws, the ADA "creates a separate right of action" to remedy illegal discrimination *J.B.K.* , ***at*** ¶ 24. Although state and federal discrimination laws may not create an affirmative defense in a termination proceeding, this present case is not a termination action. This case involves exercise of the "separate right of action" created by the Montana Human Rights Act and the Governmental Code of Fair Practices Act. Thus, this proceeding does not address or decide whether illegal disability discrimination under state law is an affirmative

defense in a termination proceeding. Even if it is not (as it may not be), a disability discrimination claim could still arise out of the conduct of DPHHS in investigation of reports of neglect.

Investigation of neglect reports may not appear to be a service to the parents investigated (likewise, detainees probably do not view being arrested as a "service"). As DPHHS pointed out, CFSD is authorized to provide "protective services" only after it finds from its investigation that there is reasonable cause to suspect abuse or neglect. Mont. Code Ann. § 41-2-202(5)(a).

Nonetheless, Mont. Code Ann. § 49-2-308(1)(a) of the Human Rights Act prohibits refusing, withholding or denying a person any "services, . . . advantages or privileges because of . . . physical or mental disability." Gage was certainly a candidate for CFSD's services of child protection, as the child allegedly neglected in a series of confidential reports. The investigations actually were the performance of services to the entire community (ensuring and protecting the safety of children) as well as to the child involved. CFSD could not treat Gage's mother less favorably because of her disability without denying Gage and the community the same degree of child protection according in other investigations. CFSD also could not treat Geri Glass, Gage's mother, less favorably because of her disability during those same investigations, without denying her the "advantage" of fair and unbiased treatment.

Since the investigations actually were the performance of services to the involved child and to the entire community, those investigations had to be "performed without discrimination based upon . . . physical or mental disability," pursuant to Mont. Code Ann. § 49-3-205(1) of the Governmental Code of Fair Practices Act. The statute applies to discrimination against the recipient of the service, but it also extends to discrimination in the performance of the service.

Under both the Human Rights Act and the Governmental Code of Fair Practices Act, "service" is not such a narrow term that selectively harsher application of the police power against persons with disabilities is free of the prohibition against discrimination in services.[16] Given the extraordinary powers CFSD can wield when it has reasonable concern for the safety of a child in the home, the safeguards of Montana discrimination law must apply to its method of exercising those powers.

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[16] CFSD can legally investigate neglect reports even when the alleged neglect results from disability. Mont. Code Ann. § 41-3-202 mandates assessment of and appropriate response to every report of abuse or neglect. Montana's discrimination laws, read in harmony with this statute, do not exclude reports of neglect actually or potentially due to disability from CFSD's statutory duty.

B. DPHHS Exercised the Police Power Against Geri in a Selectively Harsher Fashion, Because of Her Disability.

As already noted, Geri had the burden to prove that (1) she is an individual with a disability; (2) she is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) she was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity and finally, (4) the exclusion, denial of benefits, or discrimination was by reason of her disability. The exact make-up of the elements of proof is flexible, to fit the particular allegations of the case involved. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. Restating these elements to fit this case, Geri had to prove that (1) she had a disability; (2) her disability was the only reason she came under scrutiny regarding her parenting (***i.e.***, she was otherwise a fit parent); (3) she was treated significantly less favorably by CFSD during the investigation than parents under scrutiny without her disability and (4) the adverse treatment was because of her disability.

There is no question that Geri has a disability. There is, in this case, no doubt that her disability was the sole cause of the investigation into her fitness safely to parent Gage. CFSD treated her differently than it treated other parents under scrutiny who did not have disabilities. Finally, the substantial evidence presented by charging parties made it more likely than not that she was treated less favorably because of her disability. Geri proved her prima facie case.

To get an order for immediate protection and emergency protective services, DPHHS had only to show probable cause. Mont. Code Ann. §§ 41-4-422(5)(a)(i). DPHHS could have obtained a probable cause order, and could have obtained medical information without giving Geri false reasons for seeking it.

To get temporary legal custody of Gage because Geri might neglect Gage, DPHHS had to prove its case in district court by a preponderance of the evidence. Mont. Code Ann. §§ 41-4-422(5)(a)(ii). Given the testimony in the present proceeding, it seems doubtful that DPHHS could have met this standard with regard to the risk of Gage's neglect by Geri. DPHHS' defense that it treated Geri the way it did out of concern for the risk to Gage fails, because here, as in a district court case to get temporary custody, DPHHS failed to establish by a preponderance of the evidence that there was such a risk.

To terminate Geri's parental rights for failure properly to care for Gage, DPHHS had to prove its case in district court by clear and convincing evidence.

Mont. Code Ann. §§ 41-4-422(5)(a)(iv).[17] Based upon the evidence in this case, it seems impossible that DPHHS could have presented clear and convincing evidence to terminate custody, if it could ever have reached that point with a mother ready, willing and eager to do whatever she had to do to parent her child.

Nonetheless, CFSD chose to treat Geri more harshly than it ordinarily treated parents under its scrutiny who did not have disabilities..

An investigation into allegations of child abuse and neglect that is closed as "unsubstantiated" would not ordinarily constitute an adverse action against the parent. However, treating Geri more harshly than non-disabled parents and thereby coercing her into a long-term commitment never to be alone with her child without a doctor's written approval, did constitute an adverse action. DPHHS' defense of "no adverse action" failed.

CFSD disputed some but not all of the facts upon which the Hearing Officer found it had treated Geri differently than other scrutinized parents. Some discussion of those disputed facts is appropriate.

Anderson testified that on December 30, 2004, during her initial meeting with Geri and Gage, she identified herself to Geri and to Janice Wood as a CFSD social worker, present to determine whether Gage was safe, because CFSD had received a report that Gage was at risk of neglect. Two of the four people present during that visit (excluding Gage, who was a newborn at the time)–Janice Wood and Mary Einsvang–did not testify at hearing. Given the agreement between the two people who did testify–Geri and Anderson–that the visit was friendly throughout, it is more likely than not that Anderson concealed both the purpose of her visit and her actual position with DPHHS.

Geri's testimony regarding many of the particulars of various meetings with both DPHHS personnel and health care professionals was imperfect and incomplete. The evidence at hearing also established that Geri withheld information and made false statements to persons she distrusted, when she felt it was in her best interests.

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[17] The state is held to a stricter evidentiary standard in termination proceedings, and is required to appoint counsel for parents unable to afford same, because parents have a due process right to effective assistance of counsel in termination proceedings, as "the interest at stake is one of the most basic of all civil liberties, the right to direct the upbringing of one's child." *In the Matter of A.S.*, ¶14, 2004 MT 62, 320 Mont. 268, 87 P.3d 408, ***quoting*** *V.F. v. State* (Alaska 1983), 666 P.2d 42, 45, ***see also*** *Troxell v. Granville* (2000), 530 U.S. 57, 66.

Relying solely upon Geri's account of this or any other interaction with CFSD personnel is therefore inappropriate.

However, in addition to Geri's account and the absence of any collaborative evidence that Anderson at least left a copy of the usual information about CFSD investigations at the home, it is highly improbable that Anderson could have identified herself and explained the real purpose of her visit without a strong negative reaction from Geri. For the very same reason it is incredible that Anderson followed her customary practice and brought with her a copy of the summary of the allegations in the report, telling Geri the gist of that summary ("what the concerns are"). The visit would certainly have changed from amicable to confrontational if Anderson had made any such statements. Given Anderson's incredible assertions about what she told Geri, her further testimony that she left an informational pamphlet at the Janice Wood residence is also not credible.

The bare findings of what CFSD did differently than its normal practice during its dealings with Geri and Gage do not fully capture the apparent reasoning of its personnel. Based upon the various confidential reports and the information gathered from health care providers, CFSD perceived a real and present danger to Gage. Its duty to investigate and assure Gage's safety was primary. There is no substantial evidence that any DPHHS employee harbored any conscious discriminatory animus toward Geri because she was quadriplegic. Instead, the evidence strongly suggests that CFSD acted out of a sense of urgency to protect Gage from a perceived immediate threat of neglect. Bearing in mind that sense of urgency, it would be unfair and inaccurate to conclude that any DPHHS employee acted maliciously in dealing with Geri.

But even bearing in mind the lack of any training of CFSD employees regarding Montana's laws against disability discrimination, it would likewise be unfair and inaccurate to find that the conduct of CFSD in dealing with Geri was professional and proper. DPHHS provided no credible explanation for CFSD's departures from normal procedures, aside from the insistence of the persons taking the actions, primarily Maddren-Broughton and secondarily Anderson, that they feared for Gage's safety. There is a cognitive and evidentiary disconnect between that assertion and the evidence of CFSD's actions. Gage was not at risk while Geri was at Janice Wood's residence, but he was also not at risk while he was at Peggy Glass' residence. There is no evidence to support the urgency with which CFSD proceeded, which means there is no evidence to support the departures by CFSD from their standard operating procedures.

The only realistic conclusion the Hearing Officer can draw is that Geri was denied normal procedures, as well as explanations and notices regarding her rights in the process, to prevent her from the benefit of the normal procedures and the possible exercise of her rights. Lacking training in special concerns and procedures appropriate before imposing long-term conditions upon the parenting practices of a disabled parent, without solid proof of abuse, neglect, or present or long-term risk of it, CFSD employees acted without personal subjective malice toward Geri but nonetheless acted because of her disability. In the absence of personal subjective malice, that can only mean that CFSD employees felt strongly that further investigation of Geri's capacity to parent might increase or at least prolong the risk of harm to Gage, AND those employees did not see any need further to substantiate the risks, unaware of any countervailing obligations of fairness to Geri.

CFSD at no time removed Gage Glass from Geri Glass' custody under either its emergency protective services authority or pursuant to a petition to remove. However, Glass, Kovac, Anderson and Maddren-Broughton herself all testified that on one or more occasions Maddren-Broughton said that Geri would have to produce a plan of care[18] for 18 years, or at least for 10-12 years to retain custody of Gage. Clearly, CFSD believed that Geri could not safely be alone with her child. Although that belief was generally supported by two physicians and reinforced by the series of confidential reports, CFSD should have gone further to test the validity of its belief and should have cooperated with Geri (as it represented it would do and was doing) in further investigation into whether she could care for Gage, with or without an accommodation.

It is also true that in the course of this entire contested case proceeding regarding liability, CFSD's assertion that Geri could not be alone at night or for other any prolonged time with her infant son has never been fully rebutted. Although she was given the opportunity, Geri never met CFSD's requirement that she provide a signed statement from at least one physician attesting that she can safely be alone with Gage under these circumstances. The Hearing Officer must note that CFSD's remarkable demand that the physician vouch for the safety of Gage with Geri seems

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[18] The demand was for particulars. The term "24/7" or 24 hours a day/7 days a week was used repeatedly. See, among others: *Ex. 4; Ex. 7, 0130, 0131, 0132, 0133;* Tr. 246-48 [Gilliam], Tr. 352 [Peggy Glass], Tr. 1237-1239 [Maddren-Broughton]. Watson understood that CFSD was demanding that Geri identify "who would be caring for [Gage] every minute of every day for the next 18 years and what he was going to be doing, who his caregivers were going to be, other than Geri." Tr. 309. Maddren-Broughton claimed at the hearing that the demand for a 24/7, 18 year plan of care was a misunderstanding that she cleared up with Barb Hilton, one of Geri's case workers. Tr. 1215, 1263-64 [Maddren-Broughton]. Even if so, Maddren-Broughton made no effort to clarify it with Geri Glass. *Id.*

all but impossible to obtain. The liability insurance carrier for a physician who gave such a blanket guarantee might cancel coverage or at least substantially increase premiums for an insured who handed out such a written guarantee.

Both the Montana Human Rights Act and the Governmental Code of Fair Practices Act define discrimination based upon disability to include "the failure to make reasonable accommodations that are required by an otherwise qualified person" with a disability. Mont. Code Ann. §§ 49-2-101(19)(b) and 49-3-101(3)(b). Under both Acts, failure to make reasonable accommodations can thus constitute illegal discrimination. It is clear that CFSD never undertook any individualized assessment of Geri's capacity to parent Gage with or without accommodations. Thus, under both Acts, the selectively harsher application of the police power against Geri constitutes illegal disability discrimination.

The key legal question is whether DPHHS can start from the premise that a single parent with severe physical limitations must satisfy CFSD that she can safely parent her infant without constant assistance. Under Montana discrimination law, and the Montana child protection law, Geri did not have the burden of proof regarding what she could do for her son. CFSD had to first establish, by the burdens of proof required by statute for the actions CFSD proposes to take, that Geri is unsafe to be alone with her child, before the demand for proof from Geri that she can safely parent is proper and nondiscriminatory. CFSD had to assess, in the first instance, whether Geri could safely parent with or without an accommodation, rather than require that she prove she could safely parent Gage. The Hearing Officer cannot see any way that CFSD can legally shift the burden to Geri to prove she could safely parent her child, based solely upon information it had, when the only reason for the concern was her disability, rather than any actual neglect or abuse.

Montana's youth in need of care statutes provide formal mechanisms through which parents with disabilities receive an individualized, fact specific assessment of their parenting capabilities with or without reasonable accommodation. Parents may receive services, including various types of evaluations which may pertain to matters at issue in the case, such as psychological evaluations, drug and alcohol evaluations, neuropsychological evaluations, as well as services to assist the parent in preparing for adjudication hearings, disposition hearings or as part of the parent's treatment plan. Mont. Code Ann. §§ 41-3-437(7)(b), 41-3-438(3)(e), 41-3-443. These mechanisms come into play once CFSD asserts the right and need to intervene in care of the child. By the methods CFSD used in this case, Geri was expected to prove CFSD wrong, while CFSD did nothing to ascertain if it had reached the correct conclusions about the risks to Gage, despite failing to conform to its own procedures.

This would be a much closer case if the foregoing were a complete summary of the pertinent evidence, but there is more. Maddren-Broughton's February 22, 2005, memo showed an animosity toward Geri for disagreeing with Maddren-Broughton and resisting rather than submitting to CFSD's authority. That was not the only time Maddren-Broughton displayed that animosity. Maddren-Broughton testified that Geri became "angry" and "insistent" when told on January 12, 2005, that she would have to have a permanent plan in place for someone to be present to take care of Gage. Maddren-Broughton explained that "people often become angry with us in terms of our jobs and the information we provide and our requests." Yet, the investigative report, prepared under Maddren-Broughton's supervision and subject to her revision, states that Geri was calm when she disagreed with the ultimatums that CFSD presented on January 12, 2005.

Maddren-Broughton's reaction at the January 11, 2005, meeting when Taryn Kovac also asked questions about what CFSD was demanding was also indicative of her animosity toward Geri. Maddren-Broughton considered the question and Kovac impertinent and disruptive.

Finally, 15 days after the publication of the *Gazette* article triggered the interest and concern of top DPHHS officials about Geri's case, CFSD closed her case, on March 7, 2005, without any written statements from either Dr. Livers or Geri's treating physician, an act that would have been very unlikely before the *Gazette* article. In contrast to its prior concerns about Gage's safety, CFSD ignored Dr. Livers' suggestions and requests that CFSD "keep in touch" and participate in the "work in progress" of Geri's parenting of Gage. Although it is possible that CFSD would have taken exactly the same actions had Geri found Dr. Livers a month earlier, it is more likely than not that absent the negative publicity and resulting management inquiries, Dr. Liver's telephone assurances about what he was willing to do would have been insufficient to cause closure of the investigation.

C. DPHHS Did Retaliate Against Geri for Resisting Disability Discrimination.

In reporting that Geri suffered from a brain injury that caused her to misunderstand CFSD's directions and communications, in making other apparently or patently false statements, in refusing to take any action or even consider acting upon Geri's complaints about discrimination and in withholding information that might have been helpful to Geri's prosecution of disability discrimination complaints within DPHHS, CFSD retaliated against Geri for resisting disability discrimination. In light of the law and arguments presented in charging party's reply brief, pages 21-23, the retaliation claims were timely presented and relate back, as previously decided

in the prehearing motions order. Thus, in addition to her disability discrimination claims (on Gage's behalf as well as her own), Geri proved her retaliation claim.

D. Injunctive Relief Pending the Resumption of the Hearing Is Appropriate.

During this hearing CFSD asserted, in substance, that it could and would take no action regarding Geri and Gage Glass without a new confidential report that presented, in effect, a "stand alone" basis for investigation without reference to the matters in the closed file. It is appropriate to impose a temporary injunction requiring that CFSD, should that happen, follow its standard procedures and not repeat the discriminatory treatment it meted out to Geri in investigating the original report.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over these complaints and this case. Mont. Code Ann. §49-2-512(1) (2007).

2. Prehearing motions upon which the Hearing Officer has not expressly ruled, including but not limited to motions to take administrative notice, are granted to the extent that the findings, conclusions or opinion herein require granting of the motions, and are otherwise denied, without other specific reference to the motions.

3. The Child and Family Services Division of the Department of Public Health and Human Services discriminated against Geri Glass, and by association Gage Glass, because of Geri's disability, in violation of Mont. Code Ann. § 49-2-308 and Mont. Code Ann. § 49-3-205, by imposing different and more burdensome requirements on her than CFSD imposes on nondisabled parents, by denying to her the same advantages and privileges afforded to nondisabled parents, by denying her access to DPHHS services (including information about both services that might be available to her and access to the Department grievance and complaint resolution procedures), and by interfering with her ability to live in her own accessible home and parent her son. CFSD further failed to conduct its investigation in a manner which assessed whether Geri could safely parent Gage with or without a reasonable accommodation to her disability. In other words, CFSD failed to do a fact specific analysis that included sufficient information from Geri and from qualified professionals or experts as needed to determine what if any accommodations were necessary for her safely to parent Gage in a manner that allowed her to return to her home, be alone with her son and meet the standards imposed by CFSD.

4. CFSD retaliated against Geri in violation of Mont. Code Ann. § 49-2-301 and Mont. Code Ann. § 49-3-209 by taking adverse action against Geri because she complained that CFSD was discriminating against her due to her disability, by withholding information about services that may be available to assist her, and by failing and refusing to address her complaints in accordance with the DPHHS' obligations pursuant to law and its own policy and procedure.

5. Geri Glass is entitled to injunctive relief, pursuant to the mandate of Mont. Code Ann. § 49-2-506(1), ordering DPHHS (a) to refrain from further discriminating against Geri Glass in violation of Title 49 as found herein; (b) to refrain from any further failure to accept, to investigate and to forward, in accordance with DPHHS policy and procedure, any complaint of discrimination made by Geri Glass against CFSD or any of its employees or agents; (c) to follow its standard process in all respects should it receive any further reports of abuse or neglect regarding Gage Glass; (d) in the event that CFSD undertakes any further investigations of Geri Glass' ability safely to parent her son Gage, to investigate whether there are Medicaid services that could be provided under the waiver to resolve the alleged problems and keep the baby with the mother; and (e) to refrain from denying Geri Glass information about services that may be available to her to assist her in parenting her son.

6. Charging parties are entitled to a remedial phase hearing to determine any damages that may have resulted from the illegal discrimination and retaliation. Mont. Code Ann. § 49-2-506.

7. Charging parties may further be entitled to an order of affirmative relief, including but not limited to modification of the injunctive relief accorded herein, upon evidence presented in the remedial phase of this contested case hearing, as deemed necessary to minimize the likelihood of future acts of disability discrimination and retaliation by CFSD. Mont. Code Ann. § 49-2-506.

VI. ORDER

1. Judgment is found in favor of charging parties Geri Glass and Gage Glass and against the Montana Department of Public Health and Human Services on the charges that DPHHS discriminated against Geri, and by association Gage, and retaliated against Geri Glass, all in violation of Title 49.

2. DPHHS is ordered and enjoined to comply with provisions (a) through (e) of Conclusion of Law No. 4, ***supra***.

3. The Hearings Bureau will contact counsel of record to schedule a telephone status and scheduling conference as soon in 2008 as possible, to set a schedule for the remedial phase of this contested case hearing.

4. This is not a final order and is not certified as final for purposes of appeal.

Dated: December 21, 2007

/s/ TERRY SPEAR
Terry Spear, Hearing Officer

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